BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAM F. TAGLIERI	)	
Claimant	)	
	)	
VS.	)	
	)	
ABLE BODY CORPORATION	)	
Respondent	)	Docket No. 245,894
	)	
AND	)	
	)	
CNA INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the May 13, 2002 Award of Administrative Law Judge Steven J. Howard. The Board heard oral argument on November 20, 2002. Gary M. Peterson was appointed as Board Member Pro Tem for the purpose of determining this matter.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered accidental injury arising out of and in the course of her employment on July 16, 1999. The Administrative Law Judge (ALJ) awarded

claimant an 87 percent work disability based upon a 74 percent task loss and a 100 percent wage loss.

The sole issue raised on review by the respondent is nature and extent of claimant's disability. Respondent argues the claimant refused to perform an accommodated position within her restrictions and consequently should be limited to her functional impairment. In the alternative, respondent argues claimant did not make a good faith effort to find appropriate employment and a post-injury wage should be imputed for determination of the wage loss component of her work disability.

Claimant requests the ALJ's Award be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the Award should be affirmed.

Claimant was employed by respondent as an assembler making plastic parts for the cabs of diesel tractors. While performing those job duties she began experiencing pain and tingling in both of her hands. Claimant was reassigned to a material handler position and her symptoms went away. But after approximately a month, claimant was again placed in the assembler job position and the pain in both of her hands returned.

Claimant sought treatment from Dr. Adam Paoni, her personal physician, and was referred to Dr. Devendra Jain for an EMG which was positive for bilateral carpal tunnel syndrome. Dr. Jain prescribed wrist braces for both of claimant’s hands and provided restrictions against repetitive activity. The claimant gave those restrictions to respondent but her job duties were not changed.

The respondent referred claimant to Dr. William J. Sullivan at the Occupational Health Center at Mount Carmel Medical Center. Dr. Sullivan examined claimant on July 29, 1999, and diagnosed preexisting bilateral carpal tunnel syndrome which had been aggravated by her work activities with respondent. Dr. Sullivan imposed restrictions against twisting, bending and repetitive motion of both wrists and claimant was to wear wrist splints on both wrists.

The respondent provided Dr. Sullivan with a janitor’s job description and after the doctor agreed claimant could perform those duties within his restrictions, the claimant was placed in the janitor position. Claimant was required to sweep, mop, vacuum, empty trash and clean the bathrooms and break room. Claimant noted sweeping, vacuuming and using the industrial size mop required her to repetitively flex her wrists.

The condition of claimant's hands worsened and she advised her supervisor on several occasions that performing the janitor job was causing her problems. When claimant returned to Dr. Sullivan, she also advised him that the janitor job was causing her condition to worsen and that she felt respondent was not honoring her restrictions because the work was repetitive. Claimant was also concerned about the care she was receiving from Dr. Sullivan because she perceived him to be the company doctor. Dr. Sullivan contacted respondent and was advised that claimant's restrictions were being met and he concluded her light-duty janitor work was appropriate.

Claimant's attorney arranged for Dr. Sullivan to see claimant on August 13, 1999, earlier than her next scheduled appointment and the doctor concluded claimant should be referred to an orthopedic surgeon. On the referral from Dr. Sullivan, claimant was examined by Dr. John M. Veitch on August 25, 1999. Dr. Veitch recommended that treatment proceed with a right carpal tunnel release.

Because Dr. Veitch indicated in a September 13, 1999 letter to Dr. Sullivan, that he could not determine whether work had caused claimant's carpal tunnel syndrome the insurance carrier apparently determined no further treatment would be provided to claimant.

As claimant continued to attempt to perform the janitor job she told her employer her hands were hurting and she requested additional treatment but was told that the insurance company would not cover further treatment.

Finally after a three-day weekend which had not provided any relief for claimant's hand pain, she called on September 7, 1999, and told Michael Nava that she would not be in that Tuesday because her hands were hurting. The following day claimant again called and requested additional treatment or that a different job be provided. Mr. Nava denied the request for additional treatment but he told claimant he would check with her supervisor to see if any other lighter duty work was available. Claimant's supervisor then called and told claimant that if she got better she should let him know.

On Friday, September 10, 1999, claimant went in to pick up her check and was directed to see Kathy Manning. Claimant was handed her check in an envelope which had "terminated" written on it. Claimant was then asked questions and her answers were placed on an exit interview document which claimant signed. But claimant testified the box that was marked indicating she resigned had not been marked when she signed the document.

On October 18, 1999, claimant was again seen by Dr. Veitch and after examination he concluded claimant had aggravated the preexisting condition in her hands performing her work activities with respondent. The respondent then provided the doctor with a videotape depicting claimant's pre-injury job duties as well as her post-injury accommodated job duties. The doctor's opinion remained unchanged that claimant's work

activities had aggravated her preexisting bilateral carpal tunnel syndrome. Ultimately, Dr. Veitch performed a right carpal tunnel release on November 17, 1999. A left carpal tunnel release was performed on April 26, 2000.

Claimant began a job search and on August 22, 2000, she began work as a housekeeper for Holiday Inn working approximately 20 hours a week. Claimant performed that job for approximately two and a half months but had to quit because she began to experience pain in both hands. She resumed her job search and accepted part-time seasonal work with a florist April 21, 2001. This job lasted until June 1, 2001. After that claimant continued to look for work and was unemployed at the time of the regular hearing.

Claimant's job search included checking the newspaper, the internet as well as just contacting prospective employers. Claimant further noted that although she would prefer a second shift job she applied for day shift positions as well.

Permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.[1] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Respondent argues claimant should be limited to her functional impairment rating because she left accommodated work as a janitor that was within her restrictions. Initially, it should be noted that claimant had attempted to perform the janitor job but had repeatedly advised her supervisors as well as the treating physician that those job duties were causing increased pain in her hands. Claimant then missed a few days work because of hand pain and when she went in to work to get her paycheck, she was handed an envelope containing her paycheck with the notation "terminated" on it. It is the Board's finding that claimant was terminated from her employment with respondent and did not resign. Consequently, claimant did not leave accommodated work but was instead terminated from employment by respondent.

Moreover, assuming claimant had resigned she still would not be limited to her functional impairment. Although Dr. Sullivan felt claimant could perform the janitor job duties, Drs. Veitch, Harris and Prostic all agreed that a patient with bilateral carpal tunnel syndrome should be restricted from performing repetitive wrist flexion such as sweeping and mopping. The Board concludes claimant attempted to perform the janitor job but experienced increased symptoms in her hands. Consequently, claimant would not be limited to her functional impairment where she attempted the offered work and was not able to perform the work because of her work related injury.[2]

Respondent next argues that a wage should be imputed to claimant because she did not make a good faith effort to find appropriate employment. The Board disagrees. Claimant provided a list which included the employers she contacted seeking employment.[3] Claimant obtained a job which she attempted but could not continue because it resulted in a return of her hand pain. Claimant resumed her job search and obtained a seasonal job which only lasted a couple of months whereupon she again resumed her job search. This is not a case where claimant's job search efforts were a sham as demonstrated by the fact she found employment and returned to work on two occasions. Based upon the totality of the evidence, the Board concludes claimant did engage in a good faith effort to find appropriate employment.

The Board is not unmindful of respondent's vocational expert Mary Titterington's opinion that claimant did not engage in an active job search because she made 5 contacts a week instead of 10. Nonetheless, the Board finds more persuasive claimant's testimony that she did not limit her job search to second shift jobs and that she did not provide an inflated list of her job contacts as inferred by Ms. Titterington. It is difficult to accept the

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[2] See *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[3] R.H. Trans., Cl. Ex. 5.

opinion that claimant placed barriers on her attempt to find employment when after a few months search she twice found employment.

Lastly, respondent argues claimant cannot be entitled to a 100 percent wage loss because she did work for a few months at each of the jobs she obtained after she was no longer employed by respondent. Claimant's wage loss component of the work disability formula would be reduced while she was working and earning a wage. But due to the relatively short time period she worked, the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge Steven J. Howard dated May 13, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director